

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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APR - 8 1992

Federal Communications Commission
Office of the Secretary

In the Matter of)

CELSAT, INC)

Request for a Pioneer's Preference)
Regarding Its Petition For Rulemaking)
to Allocate Spectrum and To Establish)
Rules and Policies for a New Hybrid)
Personal Communications Network Service)

RM No. 7927

PP No. 28

To: The Chief Engineer

**PETITION TO DISMISS OR DENY REQUEST
FOR PIONEER'S PREFERENCE OF CELSAT, INC.**

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SUMMARY

TRW requests the dismissal of the Pioneer's Preference Request filed by CELSAT, Inc. because it is not supported by a viable rulemaking petition. Even if it were properly supported, the request would still have to be denied on its merits.

The rulemaking proposal is not viable because neither set of frequencies requested by CELSAT can be made available at this time for CELSAT's proposed service and therefore, its underlying proposal could not be effectuated. One of the frequency band pairs requested by CELSAT is currently the subject of several competing applications and rulemaking requests, all of which are mutually exclusive with CELSAT's plans. Because, CELSAT did not file an application for these frequencies within a cut-off period established by the Commission last year, any application which CELSAT might now file for such frequencies would be effectively barred from concurrent consideration with the pending processing group and would be dismissed as unacceptable for filing. The alternative frequency band pair identified by CELSAT was not allocated internationally at the 1992 World Administrative Radio Conference for mobile satellite use. Thus, the United States would only be able to make such frequencies available for mobile satellite use on a secondary non-interfering basis,

which would not be satisfactory for CELSAT's full service satellite system. Without a viable rulemaking proposal, CELSAT's pioneer's preference request must be dismissed.

Alternatively, if it were found eligible to be considered, CELSAT's pioneer's preference request must be rejected as contrary to the policies and rules established in the pioneer's preference proceeding. CELSAT has failed to show that its proposal is technically feasible or that it contributed to any technological innovations. Thus, CELSAT has not established that it possesses the characteristics required for an award of such a preference. Furthermore, a nationwide preference for CELSAT's sole-provider mobile satellite system would be inconsistent with the Commission's spectrum sharing and multiple entry policies, and would serve to deny other pending RDSS applicants the full and fair consideration guaranteed to them by law.

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**PETITION TO DISMISS OR DENY REQUEST
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TRW Inc. ("TRW"), by its attorneys, hereby respectfully requests that the Commission dismiss as ungrantable the Request for Pioneer's Preference filed by CELSAT, Inc. ("CELSAT") on February 6, 1992. While CELSAT submitted a petition for rulemaking concurrently with its request for pioneer's preference, that companion rulemaking petition is ungrantable because it calls alternatively for the

use of two sets of frequencies, which for differing reasons are unavailable for CELSAT's proposed use.^{1/}

TRW demonstrates in this petition and in its petition to deny or dismiss CELSAT's rulemaking proposal that any further consideration of CELSAT's rulemaking petition or the pioneer's preference request based thereon would be moot and a waste of the Commission's valuable resources. TRW also shows that, in the event the Commission decides to consider CELSAT's pioneer's preference request, the Commission must conclude that a grant thereof would be contrary to the pioneer's preference policy and would unalterably prejudice the statutorily required comparative hearing process.

I. CELSAT's Request For Pioneer's Preference Was Not Accompanied By A Viable Petition For Rulemaking

In Establishment of Procedures to Provide a Preference to Applicants Proposing An Allocation For New Services ("Pioneer's Preference Order"), the Commission stated that, as a qualifying matter, it would require that a pioneer's preference application be accompanied by a rulemaking petition requesting either the allocation of spectrum or the amendment of existing rules to accommodate proposed services or new

^{1/} TRW's opposition to CELSAT's Petition for Rulemaking is set forth in TRW's "Petition to Dismiss Rulemaking Request of CELSAT, Inc.," filed concurrently herewith. TRW's arguments against CELSAT's petition for rulemaking are incorporated herein by reference.

technologies. 6 FCC Rcd 3488, 3492 (1991). Implicit in such a policy is the requirement that the associated request for rulemaking be viable. Where an accompanying rulemaking may not be granted and the underlying proposal may not be effectuated, the consideration of any request for a pioneer's preference would be moot.^{2/}

Here, as shown below, CELSAT's rulemaking proposal is clearly not viable. CELSAT is barred from using one of its proposed frequency band alternatives by the existence of six pending satellite system applications for the same bands. All six applications were timely filed by a cut-off date established by the Commission and the processing group cannot now be disturbed. CELSAT's other frequency band alternative was effectively made unavailable to CELSAT by virtue of the Final Acts of the recently-concluded World Administrative Radio Conference ("WARC-92"). Because neither of CELSAT's proposed frequency plans is viable, CELSAT's petition for rulemaking is subject to summary dismissal.

^{2/} On reconsideration, the Commission generally upheld this requirement. Pioneer's Preference Recon. Order, Gen. Docket 90-217, FCC 92-57, slip op. at 7-8 (¶ 17) (released February 26, 1992). The Commission stated: "we continue to believe it necessary and appropriate to require that a preference application be accompanied by a petition for rulemaking." Id. The Commission adopted two exceptions to this requirement, but, as explained below, neither is applicable here. Id. at 8-9 (¶¶ 18-19).

**A. The Rulemaking Petition Is Not Viable
Because Any Application Now Filed by CELSAT
Which Requested Use Of The RDSS Band
Frequencies Is Cut-Off And Must Be Dismissed
As Unacceptable For Filing.**

On April 1, 1991, the Commission released a Public Notice accepting for filing applications of Motorola Satellite Communications, Inc. ("Motorola") (File Nos. 9-DSS-P-91(87) and CSS-91-010) and Ellipsat Corporation ("Ellipsat") (File No. 11-DSS-P-91(6)), which requested the use of the 1610-1626.5 MHz and 2483.5-2500 MHz bands -- frequencies allocated domestically to the radiodetermination satellite service ("RDSS") -- for their proposed satellite systems. See Public Notice, 6 FCC Rcd 2083 (1991). That Notice, issued pursuant to what is now Section 25.141(b) of the Commission's Rules, established a 60-day cut-off period, ending June 3, 1991, during which interested parties could file competing applications proposing satellite systems which would make use of the same RDSS frequencies.^{3/} The Public Notice made clear that a mutually

^{3/} In response to the Public Notice, on or before the cut-off date, the following parties filed competing applications proposing alternative uses of these RDSS-Band frequencies: TRW, File Nos. 20-DSS-P-91(12) and CSS-91-015 (Odyssey System); Loral Qualcomm Satellite Services Inc. ("Loral"), File Nos. 19-DSS-P-91(48) and CSS-91-014 (Globalstar System); Constellation Communications, Inc. ("Constellation"), File Nos. 17-DSS-P-91(48) and CSS-91-013 (Aries System). In addition, Ellipsat submitted additional applications for a second phase system, File No. 18-DSS-P-91(18) (Ellipso II), and AMSC Subsidiary Corporation ("AMSC") amended its domestic generic mobile satellite service ("MSS") application to include frequencies in the RDSS bands on two of its satellites

exclusive application filed after the cut-off period would be dismissed as unacceptable for filing, and would not be considered in conjunction with the original application(s) placed on Public Notice or the applications timely filed in response thereto.

CELSAT failed to file an application by the June 3, 1991 cut-off date established for satellite systems that would operate in the RDSS bands. Indeed, CELSAT has apparently still not filed an application to accompany its petition and pioneer's preference request, even though such an application was to have been filed concurrently therewith. See CELSAT Petition for Rulemaking at 1. Moreover, CELSAT has not requested a waiver, nor set forth any unusual or compelling facts indicating that its failure to file an application within the cut-off period was due to circumstances beyond its control. In fact, CELSAT has offered no explanation whatsoever for its failure to comply with the filing deadlines, nor has it offered even one reason why the Commission should abandon its normal strict cut-off procedures and reopen the filing period. Thus, CELSAT is effectively cut-off from applying for frequencies in the 1610-1626.5 MHz and 2583.5-2500 MHz bands.

(Footnote continued from previous page)

^{3/} (File Nos. 15-DSS-MP-91 and 16-DSS-MP-91). In addition, TRW, Loral, Constellation, Motorola, AMSC and Ellipsat all subsequently filed petitions for rule making in connection with their applications.

B. CELSAT's Rulemaking Petition Is Not Viable Because Its Proposed Use Of Frequencies At 2.1 And 2.4 GHz Is Similarly Ungrantable.

CELSAT's alternatively requested frequency allocations involve the use of its so-called "Band-A" frequencies at 2110-2129 MHz and 2410-2428 MHz. In its rulemaking petition, CELSAT requested that the Commission amend its table of frequency allocations, to adopt in their entirety modifications proposed by the U.S. delegation at WARC-92. See CELSAT Petition at Exhibit 2.

However, at WARC-92, the Band-A frequencies sought by CELSAT were not allocated for mobile satellite use on either a regional or worldwide basis. Specifically, within International Telecommunication Union Region 2 (which includes the United States), frequencies between 2110-2120 MHz and 2410-2428 MHz may not be used at all for mobile satellite service, while the 2120-2129 MHz band is only available for such uses on a secondary, non-interfering basis. See Addendum and Corrigendum to the Final Acts of World Administrative Radio Conference (WARC-92), at 18, 20.

While the Commission could adopt modifications to its table of allocations inconsistent with those adopted by the WARC, any U.S.-licensed satellite operator utilizing such frequencies for mobile satellite service would have to cease operation immediately in the event that harmful interference

were caused to any entity utilizing those frequencies in an authorized manner.^{4/} Therefore, a modification of the Commission's table of allocations as requested by CELSAT would allow for construction of costly full service mobile satellite systems that could provide service on these frequencies only on a non-interfering basis, and CELSAT has not indicated that it would undertake to construct its system on such a basis.

**C. Because CELSAT's Petition For Rulemaking Is
Not Viable It Must Be Dismissed.**

Because CELSAT is effectively cut-off from filing a supporting application to utilize the RDSS-band ("Band-B") frequencies at this time, further processing of its rulemaking proposal would be academic, and would serve only to burden the Commission's processes and delay service to the public from applicants already on file in the RDSS service.^{5/} In addition,

^{4/} International Telecommunication Union, Radio Regulation ("RR") No. 342 specifically states:

Administrations of the Members shall not assign to a station any frequency in derogation of either the Table of Frequency Allocations given in this Chapter or the other provisions of these Regulations, except on the express condition that harmful interference shall not be caused to services carried on by stations operating in accordance with the provisions of the Convention and of these Regulations.

^{5/} Section 1.401(e) of the Commission's Rules states that "petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission, may be denied or dismissed without prejudice to the petitioner." 47 C.F.R. § 1.401(e).

because the frequencies requested by CELSAT in Band-A could only be allocated by the Commission for use in the mobile satellite service on a non-interfering basis, they would not be suitable for use in conjunction with CELSAT's proposed full-service satellite system. Therefore, because neither of the alternative frequency plans proposed by CELSAT is capable of being effectuated, its rulemaking request is moot and must be dismissed without further consideration.^{6/}

II. CELSAT's Request For Pioneer's Preference Must Be Dismissed Along With Its Ungrantable Rulemaking Petition

In the absence of a viable rulemaking request, CELSAT's pioneer's preference request is completely unsupported. As noted above, the Commission has intimated that a non-viable rulemaking petition would not qualify for consideration under the Commission's procedures. See Pioneer's Preference Order, 6 FCC Rcd at 3492. Furthermore, CELSAT's pioneer's preference request is not salvaged by exceptions to the general rule which would allow the Commission to consider a

^{6/} In the past the Commission has denied rulemaking requests where the underlying proposal could not be effectuated in conformity with the Commission's other rules and policies. See, e.g., Amendment of Section 73.202(b): Sonora California, 6 FCC Rcd 6042 (1991); Amendment of Section 73.202(b): New Boston, Kentucky, 48 R.R. 2d 1628 (1981) (refusal to grant rulemaking request where FM service could not provide city grade coverage).

preference request in the absence of a related rulemaking proposal.^{7/}

While CELSAT is generally proposing services similar to those proposed by TRW and others in pending applications and rulemaking petitions, it may not rely on the pendency of such petitions in an effort to secure consideration of its pioneer's preference request. CELSAT's proposal would require rule changes incompatible with those proposed by other parties seeking to use the RDSS-band frequencies, and therefore its preference request may not be considered in conjunction with any of the rulemaking requests currently pending before the Commission. In addition, the Commission declined to consolidate CELSAT's pioneer's preference request into ET Docket No. 92-28 -- where all of the pioneer's preference requests filed by the other RDSS-band applicants were recently grouped. See Public Notice, Requests for Pioneer's Preference filed (released March 9, 1992).

^{7/} Pioneer's Preference Recon. Order, at 8-9 (¶¶ 18-20). Clearly, CELSAT's proposal is not one which could be effectuated without changes in the Commission's Rules. Moreover, in its petition for rulemaking, CELSAT acknowledges that in order to effectuate its proposal, the Commission would have to make significant modifications to existing rules and policies. See CELSAT Petition for Rulemaking at 36-49. In addition, to qualify for such an exception, CELSAT would have been required to submit both a waiver request and license application - items which CELSAT has clearly not filed.

Thus, because CELSAT's pioneer's preference request is unaccompanied by a viable rulemaking proposal, and does not qualify under any exception, it must be dismissed.

III. In The Event That CELSAT's Preference Request Is Considered, A Grant Of That Request Would Be Inappropriate Under The Policies And Rules Established In The Pioneer's Preference Proceeding.

A. Grant Of A Pioneer's Preference To An Applicant Proposing A Single Provider Service Is At Odds With The Commission's Purpose In Establishing The Pioneer's Preference.

The Commission has made it clear that the intent of the pioneer's preference is merely to guarantee an innovator "an opportunity to participate in the new service," by reducing risks and delays associated with the Commission's allocation and licensing processes. Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 5 FCC Rcd 2766, 2767 (¶ 7) (1990) ("Pioneer's Preference NPRM"). In rejecting its initial proposal to give pioneers a six month "head start" on system development, the Commission stated that it would be inappropriate for the Commission to do more than guarantee a pioneer a license. Pioneer's Preference Order, 6 FCC Rcd at 3492 (¶ 34). The Commission explained that it would not be justifiable for the Commission to guarantee a pioneer even a temporary service monopoly. Id.

The Commission also stated that it will not "award a pioneer's preference that would bestow a nationwide monopoly." Tentative Decision (VITA), ET Docket No. 91-280, FCC 92-21 slip op. at 6 (¶ 13) (released February 11, 1992) (emphasis added). See also Pioneer's Preference Order, 6 FCC Rcd at 3490 (¶19) ("[W]e do not intend to award a pioneer a nationwide monopoly on a service and thereby exclude others from providing that service"); Pioneer's Preference Recon. Order, at 3 (¶ 14). The Commission has expressed the belief that guarantee of a single license in one market should constitute a sufficient advantage to an innovator, and has stated that it is generally inclined not to grant even that much unless such a preference is clearly shown to be warranted. Pioneer's Preference Order, 6 FCC Rcd at 3494-3495 (¶¶ 53-54). See also Pioneer's Preference Recon. Order, slip op. at 2, 12 (¶¶ 3, 28-29).

It would be inappropriate for the Commission to guarantee a license to CELSAT which proposes a nationwide monopoly mobile satellite system that would necessarily foreclose all six of the other current petitioners from even offering their proposed RDSS and/or MSS services in the RDSS bands. See CELSAT Pioneer's Preference Request at 4, 33-34 & 42-43.^{8/} The Commission unequivocally stated that each

^{8/} The monopoly, voluntary, "pseudo sharing" approach advanced by CELSAT is directly contrary to the Commission's RDSS rules, and squarely conflicts with the varying, but

"preference holder will face competition from other service providers," and therefore has recognized that its desire to promote innovation must be balanced against its "long-standing desire to encourage diversity and competition in communications services." Pioneer's Preference Order, 6 FCC Rcd at 3495 (¶ 54); Pioneer's Preference Recon. Order, at 4 & 12 (¶¶ 8 & 29).

Under the circumstances of the instant request, where CELSAT's proposed mobile satellite system is inherently incompatible with any of the other service models proposed, guarantee of a license to CELSAT would have a devastating impact on the Commission's spectrum sharing and multiple entry policies for the RDSS service and frequency bands. See 47 C.F.R. §§ 25.141(e) & (f). See also Amendment To The Commission's Rules To Allocate Spectrum For, And To Establish Other Rules And Policies Pertaining To, A Radiodetermination Satellite Service, 104 F.C.C.2d 650, 660-61 (1986) ("RDSS Licensing Order"). CELSAT's request should therefore be denied.

B. CELSAT Is Not Deserving Of A Preference Under The Criteria Established By The Commission.

Even if the grant of a pioneer's preference to a monopolist were consistent with the Commission's clearly

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^{8/} compatible, approaches advanced separately by TRW, Ellipsat, Constellation, and LQSS. See CELSAT Petition for Rulemaking at 45-49 & n.44.

enunciated policy, CELSAT has failed to demonstrate that its proposed CELSTAR system deserves to be favored with the guarantee of a system license. CELSAT has not demonstrated that its CELSTAR proposal possesses the characteristics required for a preference; that its efforts were significant in developing the technology utilized; or even that all of the elements incorporated in its application are technologically feasible.^{9/} As all of these criteria must be satisfied before a preference will issue, CELSAT's request must be denied.

1. CELSAT Is Not An Innovator.

While CELSAT notes that one of its founders holds a U.S. patent for an integrated cellular communications system design, CELSAT makes no claim that such patent is the basis for its CELSTAR system, or even that its CELSTAR system is based on innovations in technology. See CELSAT Pioneer's Preference Request at 5 n.5. Rather, CELSAT acknowledges that the high technology elements for its proposed system are currently available in the United States, but makes no claim that it was in any way responsible for their development. Id. at 9.

^{9/} For example, CELSAT notes that its proposed system transceiver uses an analog voice waveform encoding system based upon 4.8 kbps CELP encoding, which CELSAT admits is not even expected to be available in the next generation of digital cellular phones. CELSAT simply pronounces, without support, that 4 kbps ASICs will be available within a few years. See CELSAT Rulemaking Petition at A-5 & A-11.

In the only decision to date where the Commission has awarded a pioneer's preference, the Commission based the grant upon its determination that the applicant had been the first to develop and test several of the technologies employed. See Tentative Decision (VITA) FCC 92-21, slip op. at 7 (¶ 15). In contrast, CELSAT is not the pioneering developer of the technologies its proposed CELSTAR system would use. Rather, CELSAT is simply requesting a preference for technologies developed and pioneered by others, which it merely proposes to amalgamate into a grandiose and monopolistic scheme. CELSAT is therefore not entitled to a pioneer's preference. See Tentative Decision (VITA) at 6 (¶ 13).

**2. CELSAT Has Failed To Show That Its
CELSTAR System Is Technologically
Feasible.**

Under the Commission's policies, an applicant for a pioneer's preference is required either to perform an experiment demonstrating the capabilities of its system proposal, or to accompany its preference request with a demonstration of the feasibility of the new service or technology. See Pioneer's Preference Order, 6 FCC Rcd at 3493 (¶ 39). In this regard, the Commission recently reaffirmed that "a preference applicant relying upon an experiment . . . at least must have commenced its experiment and reported to [the Commission] its preliminary results in order to be eligible for a conditional preference." Pioneer's Preference

Recon. Order, at 5 (¶ 11). Thus, the Commission continued, "a tentative preference will not be awarded to an applicant that has not submitted a demonstration of technical feasibility, nor commenced an experiment and reported to us at least preliminary results." Id. (emphasis added).

In this instance, CELSAT has not provided the Commission with a feasibility showing in its initial preference request, and has not even applied to the Commission for experimental authorization. In other words, CELSAT has offered no definitive data that would help to establish, much less confirm, the technical viability of its CELSTAR Proposal.^{10/} Thus, CELSAT's concept remains unproven, and its request for a pioneer's preference must be rejected.

IV. Grant of CELSAT's Pioneer's Preference Request Would Be Prejudicial To All Of The Other Applicants, Denying Them Statutorily Guaranteed Rights.

Even if it were assumed for the sake of argument that CELSAT had timely filed an application that was entitled to comparative consideration with the other RDSS-band applicants, and that CELSAT's request for pioneer's preference was not

^{10/} CELSAT erroneously contends that the Appendices attached to its Rulemaking petition provide convincing evidence of its proposed system's feasibility. CELSAT Pioneer's Preference Request at 9. Rather, such appendices contain nothing more than descriptions of elements of the CELSTAR system design and self-serving unsupported assertions which appear to be based on no empirical data whatsoever.

procedurally or substantively defective, it should still not be granted a pioneer's preference for its CELSTAR proposal. The grant of a nationwide pioneer's preference to CELSAT would serve to deny the other RDSS-band applicants their statutory rights to full comparative consideration, as the principal focus of the Commission would be on the "innovativeness" of CELSAT's proposal, rather than on the relative technical merits of all of the pending proposals. This result is contrary to law. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker"); 47 U.S.C. § 309.

As the Supreme Court's decision in Ashbacker makes clear, the Commission may not lawfully exclude particular mutually exclusive applicants from full comparative consideration. The Communications Act requires that all such bona fide applicants be considered on an equal footing once accepted for filing.^{11/} The post-filing imposition of "innovativeness" as a "threshold" eligibility criterion operates to deprive any non-"preferred" applicants of their Ashbacker rights.

It cannot be credibly asserted that the guarantee of a license to CELSAT, through grant of a pioneer's preference,

^{11/} The issue of the Ashbacker doctrine's overall impact on the pioneer's preference rule was addressed in greater detail in TRW's "Petition for Further Reconsideration" Gen. Docket No. 90-217, filed April 6, 1992.

would be consistent with Section 309 of the Communications Act, as interpreted in Ashbacker. A grant to CELSAT for its sole provider system would effectively deny the applications of TRW and all the other RDSS-band applicants, several of which can co-exist in a shared-spectrum environment.

Thus, even if the Commission decided to ignore the pro-comparative policies endorsed in both the RDSS Licensing Order and the Pioneer's Preference Order, and even if it did not apply the general standards discussed in the latter decision, a preference grant to CELSAT would still be at odds with the statutory requirement that bona fide applicants be given full and fair consideration.

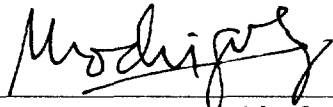
V. CONCLUSION

On the basis of the foregoing, TRW respectfully urges the Commission to find CELSAT's Request for Pioneer's Preference ungrantable and to dismiss it without further consideration. Alternatively, should the Commission consider CELSAT's request, TRW respectfully urges the Commission to carefully consider both the adverse policy consequences and the certain prejudice to competing applicants that would result from a preference grant to CELSAT. Based on these considerations, as well as CELSAT's failure even to meet the

minimum requirements established for award of a pioneer's preference, the Commission should reject CELSAT's request for a nationwide pioneer's preference for its CELSTAR system proposal.

Respectfully submitted,

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April 8, 1992

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CERTIFICATE OF SERVICE

I, Kimberly A. Moats, hereby certify that true copies of the foregoing "Petition To Dismiss Or Deny Request For Pioneer's Preference of CELSAT, Inc." was served by first-class mail, postage prepaid, this 8th day of April, 1992 on the following:

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Kimberly A. Moats